(5)

No. 87-1437

Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON,
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS,
NEVADA

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

JOINT APPENDIX

GRAVES, LEAVITT & KOCH
JOHN J. GRAVES, JR., ESQ.
601 South Sixth Street
Las Vegas, Nevada 89101
(702) 385-7277

Counsel for Petitioner
Melvin Ray Blanton

JOHN G. WATKINS, ESQ.
333 North Rancho Road,
#633
Las Vegas, Nevada 89106
(702) 646-3155

Counsel for Petitioner
Mark D. Fraley

CITY OF NORTH LAS VEGAS
ROY A. WOOFTER, ESQ.
NORTH LAS VEGAS
CITY ATTORNEY
MARK L. ZALAORAS, ESQ.
DEPUTY CITY ATTORNEY
2200 Civic Center Drive
North Las Vegas, NE 89030
(702) 649-0277

Counsel for Respondent
City of North Las Vegas

ATTORNEY GENERAL
State Mailroom Complex
Las Vegas, Nevada 89158
(702) 486-3420

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 26, 1988
CERTIORARI GRANTED JUNE 20, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CITY OF NORTH LAS VEGAS MUNICIPAL COURT
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin Ray
DOCKET/CASE NO. M2648-86
CHARGE: Driving Under the Influence of Alcohol

DATE	PROCEEDING
08/19/86	Defendant pled not guilty; Attorney appeared
06/21/88	Continued per City Attorney for Status Check to 12/15/88

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. M2408-86
CHARGE: Driving Under the Influence of Alcohol

DATE	PROCEEDING
07/15/86	Defendant Pled Not Guilty
10/28/86	Defense Motion for Jury Trial
10/28/86	Defense Motion for Jury Trial Denied
10/29/86	Change plea of guilty; fined $300.; Alcohol Vegas Verdes; Sentenced 5 days; Served 5 days (credit)
10/29/86	Accounts receivable $25.00 (O.R. on appeal per Judge Gary Davis); bond posted exonerated
11/04/86	Appeal filed

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin R.
DOCKET/CASE NO. A252811

DATE	PROCEEDING
12/30/86	**SET BRIEFING SCHEDULE**. Petitioner represented by counsel, John J. Graves, Jr. Respondents represented by counsel, DCA, Mark Zalaoras. Counsel submitted the matter on the Briefs. **COURT ORDERED**, under advisement.

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. C76512

DATE	PROCEEDING
12/12/86	**ARRAIGNMENT**. City of North Las Vegas represented by Mark Zalaoras, DCA. Defendant Fraley not present represented by John Watkins, Esq. Defendant is entering a not guilty plea. Had requested a jury trial which was denied.
01/30/87	**DEFENDANT'S MOTION TO DISMISS. COURT ORDERED**, previous order for continuance vacated and the Court having found jury demand was made in proper time, **ORDERED**, matter remanded to City of North Las Vegas for jury trial.
01/22/88	**AT REQUEST OF COURT**. Court received an Order from the Supreme Court directing this Court to vacate previous Sentence. **COURT ORDERED**, matter continued two

	weeks, Mr. Watkins to request a Stay Order from the Supreme Court.
03/11/88	**STATUS CHECK**. Court received Stay Order from Supreme Court, indicating Mr. Watkins has filed Writ of Certiorari with United States Supreme Court, **COURT ORDERED**, continued six months for status check.

SUPREME COURT OF THE STATE OF NEVADA
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin R.
DOCKET/CASE NO. 17940

DATE	PROCEEDINGS
02/25/87	Filing **RECORD ON APPEAL** (original).
05/26/87	**ORAL ARGUMENT** is set for 09/18/87 at 8:15 a.m. – 1 hour – Carson City.
06/22/87	Filing **APPELLANT'S OPENING BRIEF**
07/24/87	Filing **RESPONDENT'S ANSWERING BRIEF**
09/02/87	Filing **APPELLANT'S REPLY BRIEF**
09/18/87	**ORAL ARGUMENT**; Submitted.
12/31/87	Filing **OPINION** – "Affirm Docket No. 17940

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. 18065

DATE	PROCEEDING
04/13/87	Filing **PETITION FOR WRIT OF CERTIORARI.**
04/27/87	Filing **SUPPLEMENT OF RECORD BELOW TO PETITION FOR WRIT OF CERTIORARI.**
05/20/87	Filing **ORDER** we consolidate these cases for the purpose of oral argument (including No. 18065. We stay further proceedings against real party in interest Mark D. Fraley in North Las Vegas Municipal Court Case No. M-2408-86,

	pending our decision upon the merits of the petitions.
05/26/87	**ORAL ARGUMENT** is set for 09/18/87 at 8:15 a.m. – 1 hour – Carson City.
07/01/87	Filing **ANSWER TO PETITION FOR A WRIT OF CERTIORARI.**
09/18/87	**ORAL ARGUMENT**; Submitted.
12/31/87	Filing **OPINION** – grant petition No. 18065
12/31/87	Issuing **WRIT OF CERTIORARI**

NORTH LAS VEGAS MUNICIPAL COURT
CLARK COUNTY, NEVADA

THE CITY OF NORTH LAS VEGAS, Plaintiff, vs. MELVIN RAY BLANTON, Defendant.	)))))))	Case No. M2648-86 DEMAND FOR JURY TRIAL (Filed October 3, 1986)

COMES NOW, Defendant, MELVIN RAY BLANTON, by and through his attorney, JOHN J. GRAVES, JR., ESQ., and makes Demand for a Jury Trial on the within charge of Driving Under the Influence pursuant to the Sixth Amendment to the United States Constitution, and pursuant to the federal District Court Case of *Bronson v. Swinney*, CV-R-86-130, ECR, ordering a Jury Trial in Driving Under the Influence cases in the State of Nevada.

DATED: this 3rd day of October, 1986.

GRAVES, LEAVITT, CAWLEY & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for Defendant
601 South Sixth Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE BY MAIL

I hereby certify and affirm that on the 3rd day of October, 1986, I deposited for mailing a copy of the foregoing DEMAND FOR JURY TRIAL with postage fully prepaid thereon addressed to the following:

North Las Vegas City Attorney's Office
1928 N. Bruce
North Las Vegas, Nevada 89030

/s/
An employee of
JOHN J. GRAVES, JR., ESQ.

NORTH LAS VEGAS MUNICIPAL COURT
CLARK COUNTY, NEVADA

THE CITY OF NORTH LAS VEGAS, Plaintiff, vs. MELVIN RAY BLANTON, Defendant.	)))))))	Case No. M-2648-86 MOTION TO STRIKE DEMAND FOR JURY TRIAL

COMES NOW the CITY OF NORTH LAS VEGAS, by and through its attorney, ROY A. WOOFTER, City Attorney, by MARK L. ZALAORAS, Deputy City Attorney, and moves this Court to strike the demand for jury trial filed by the Defendant on Friday, October 3, 1986. This Motion is made and based upon the following Points and Authorities.

DATED this 9th day of October, 1986.

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By /s/ Mark L. Zalaoras
MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, NV 89030
Attorney for Plaintiff

POINTS AND AUTHORITIES

A. FACTS

The Defendant is charged pursuant to NRS 484.379 with Driving Under the Influence of Alcohol on July 18, 1986, at 9:10 p.m. in the 3500 block of East Lake Mead Boulevard, which is in the City of North Las Vegas.

The Defendant has filed a demand for jury trial based upon the Sixth Amendment to the United States Constitution and a federal district court decision announced last week in Reno, Nevada. The City Attorney's office has been apprised of the demand by virtue of the Municipal Court Clerk's Office supplying my office with a copy of the demand. Even though the City Attorney's office is immediately adjacent to the Court, Defendant has not provided for a receipt of copy to my office. He has however attached to his Demand a certificate of mailing specifying that a copy was mailed to this office.

The Demand for Jury Trial was filed October 3rd at 2:12 p.m. The trial date is scheduled for October 15, 1986 at 1:30 p.m.

B. ARGUMENT

The Defendant is not entitled to a jury trial for a misdemeanor DUI prosecution where the maximum authorized penalty is six (6) months in jail or less. In *State v. Smith*, 99 Nev. 806 (1983), the Nevada Supreme Court stated:

> "Persons are guaranteed the right to a jury trial by both art. I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both

> provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefore turns upon whether the offense charged is characterized as "serious" or "petty." See Duncan v. Louisiana, 391 U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).
>
> In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.
>
> At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .
>
> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the

right to trial by jury does not attach. As NRS 48.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

See also Exhibit A attached hereto, which is a 1975 unpublished federal district court decision denying a jury trial for a misdemeanor prosecution. In the attached opinion, there is a lengthy and well documented legal history for not permitting jury trials for misdemeanor DUI prosecutions.

Respectfully submitted,

ROY A. WOOFTER, CITY ATTORNEY
City of North Las Vegas

By MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, NV 89030
Attorney for Plaintiff

RECEIPT OF COPY

RECEIPT OF COPY of MOTION TO STRIKE DEMAND FOR JURY TRIAL is hereby acknowledged this ___ day of October, 1986.

GRAVES, LEAVITT, CAWLEY & KOCH

By _____
601 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Defendant

CASE NO. ___

DEPT. NO. ___

IN THE MUNICIPAL COURT OF
THE CITY OF NORTH LAS VEGAS
COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS, NEVADA, Plaintiff,	)	DEMAND FOR JURY TRIAL
vs.	)	
MARK D. FRALEY, Defendant.	)	

COMES NOW, Defendant, MARK D. FRALEY, by and through his attorney JOHN G. WATKINS, ESQ. and requests an Order pursuant to Article I, Section 3 of the Nevada Constitution and the Sixth Amendment of the United States Constitution directing that the instant case be tried by jury.

This Motion is made and based upon the Points and Authorities filed herewith and all testimony as may be adduced at the hearing of this Motion.

DATED this 28th day of October, 1986.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

NRS 266.565 provides,

> "The practice and proceedings in the municipal court shall conform, as nearly as practicable, to the practice and proceedings of justices' courts in similar cases, *except that an appeal perfected transfers the action to the district court for trial anew.* The municipal court shall be treated and considered as a justices' court whenever the proceedings thereof are called into question."

Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by Jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

The United States Constitution, the Sixth Amendment holds,

> *"In all criminal prosecutions,* the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

Cf., *State v. Smith,* 99 Adv. Op. 172 (1983) (*State v. Smith,* is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith,* supra.) See also *Bronson v. Swinney,* et. al, #CV-R-86-130-ECR (Dist. Ct. of Nev., 10/1/86) where the court held that a defendant is constitutionally entitled to a jury trial in D.U.I. misdemeanor cases.

Respectfully submitted,

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.

Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing DEMAND FOR JURY TRIAL is hereby acknowledged this ___ day of October, 1986.

North Las Vegas
City Attorney's Office
By: _____

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN RAY BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	CASE NO. A251117 DEPT. NO. IV PETITION FOR WRIT OF MANDAMUS (Filed November 3, 1986)

TO: The Honorable GARY DAVIS, Municipal Judge of the North Las Vegas Municipal Court, North Las Vegas, Nevada

TO: The Honorable ROY WOOFTER, North Las Vegas City Attorney

TO: The Honorable D. BRIAN McKAY, Attorney General, State of Nevada

GREETINGS

The Petition of Melvin Ray Blanton by and through his attorney JOHN J. GRAVES, JR., ESQ., respectfully shows:

1. That the Petitioner makes application herein for a Writ of Mandamus (N.R.S. 34.150, et.seq.) to Order the North Las Vegas Municipal Court to grant a Jury Trial to your Petitioner on his driving under the influence charge pursuant to the Sixth Amendment to the United States Constitution.

2. No plain, speedy, or adequate remedy exists in law for your Petitioner other than by extraordinary Writ of this Court.

3. The Municipal Court Judge abused his discretion in denying Petitioner a Jury Trial on or about October 3, 1986, and should be compelled by this Court to exercise his duty, not his discretion, to Order said Jury Trial.

4. An indefinite Stay has been entered by the North Las Vegas Municipal Judge pending proceeding before this Court.

5. Petitioner requests that the City of North Las Vegas, Nevada, by and through its attorney, the North Las Vegas City Attorney, be Ordered to Answer the Petition herein, and to file Points and Authorities in answer to Petitioner's and to grant Petitioner a time to Reply.

6. Petitioner expressly brings this Petition to the Court solely on federal constitution issues, pursuant to the 1985 State of Nevada driving under the influence statute (N.R.S. 484.379, et seq.)

7. That no other Petition for Extraordinary Relief or appeal has heretofore been filed on behalf of said Petitioner on this particular issue.

WHEREFORE, Petitioner prays that this Honorable Court Order the North Las Vegas Municipal Court to grant Petitioner's Demand for Jury Trial.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for Petitioner
601 South Sixth Street
Las Vegas, Nevada 89101

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

MELVIN R. BLANTON, being first duly sworn upon his oath, deposes and says:

That he is the Petitioner in the above-entitled matter; that he has read the above and foregoing PETITION and knows the contents thereof to be true of his own knowledge except for those matters therein stated upon information and belief and as to those matters, he believes them to be true.

/s/ Melvin R. Blanton
MELVIN R. BLANTON

SUBSCRIBED and SWORN to before me
this 30th day of October, 1986.

/s/ Beverley J. Jones
NOTARY PUBLIC in and for said
County and State.

CASE NO. M2408-86

IN THE MUNICIPAL COURT OF
THE CITY OF NORTH LAS VEGAS
COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS, NEVADA, Plaintiff,	)	NOTICE OF APPEAL
vs.	)	
MARK D. FRALEY, Defendant.	)	(Filed November 4, 1986)

TO: THE HONORABLE JUDGE OF THE MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, and

TO: THE CITY ATTORNEY FOR THE CITY OF NORTH LAS VEGAS, NEVADA.

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that MARK FRALEY, the Defendant in the above-entitled action, does hereby appeal to the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, from the judgment of the above-

entitled Court, finding the Defendant guilty of violating DRIVING UNDER THE INFLUENCE OF ALCOHOL and from sentence of said Court, being fined $300.00 and/or 0 days.

This Appeal is taken from questions of both law and fact.

DATED at Las Vegas, Nevada, this 3rd day of Nov., 1986.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing NOTICE OF APPEAL is hereby acknowledged this 4th day of November, 1986.

NORTH LAS VEGAS, CITY
ATTORNEY'S OFFICE

By: /s/ Mark L. Zalaoras
Deputy City Attorney

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN RAY BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	CASE NO. 252811 DEPT. NO. VIII ANSWER TO PETITION FOR WRIT OF MANDAMUS Date of Hearing: 12/30/86 Time of Hearing: 9:00 A.M. (Filed December 30, 1986)

COMES NOW the Respondents, NORTH LAS VEGAS MUNICIPAL COURT; THE HONORABLE GARY DAVIS, JUDGE THEREOF; and the CITY OF NORTH LAS VEGAS, NEVADA, by and through their attorney, ROY A. WOOFTER, City Attorney, by and through MARK L. ZALAORAS, Deputy City Attorney, and for their Answer to the Petition for Writ of Mandamas respectfully admit, deny and allege as follows:

1. Respondents admit all of the allegations contained in Paragraph One of the Petition.

2. Respondents deny each and every allegation contained in Paragraph Two of the Petition.

3. Respondents deny each and every allegation contained in Paragraph Three of the Petition.

4. Respondents admit each and every allegation contained in Paragraph Four of the Petition.

5. Respondents admit all of the allegations contained in Paragraph Five of the Petition.

6. Respondents admit all of the allegations contained in Paragraph Six of the Petition.

7. Respondents are without sufficient knowledge and information so as to form a belief as to the truth of the allegations contained in Paragraph Seven of the Petition, and therefore deny the same on that basis.

WHEREFORE, Respondents pray that this Honorable Court deny the Petition and that Petitioner take nothing by virtue of his application for a Writ of Mandamus.

Respectfully submitted,

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By: /s/ Mark L. Zalaoras
MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, Nevada 89030
Attorney for Respondents

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

MARK L. ZALAORAS, being first duly sworn, deposes and says:

That he is the attorney for the Respondents in the above-entitled action; that he has read the foregoing

ANSWER TO PETITION FOR WRIT OF MANDAMUS and knows the contents thereof; that the same is true of his own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters he believes it to be true.

/s/ Mark L. Zalaoras
MARK L. ZALAORAS

SUBSCRIBED and SWORN to before me this 30th day of December, 1986.

/s/ Nancy Ralston
NOTARY PUBLIC

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN R. BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	)	CASE NO. 252811 DEPT. NO. VIII DOCKET "M" DECISION AND ORDER (Filed January 14, 1987)

The Petitioner seeks Mandamus to compel the North Las Vegas Municipal Court to grant Petitioner a jury trial on a misdemeanor charge of Driving Under the Influence of Alcohol.

Petitioner relies on the recent case of *Bronson v. Swinney*, decided September 29, 1986, in the United States District Court, District of Nevada CV-R-86-130-ECR.

Notwithstanding the holding in that case, this Court finds that the decision in *State v. Smith*, 99 Nev. 806 (1983) is dispositive of the issue.

The petition for the Writ of Mandamus is denied.

IT IS SO ORDERED.

DATED this 14th day of January, 1987.

/s/ Michael Wendell
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN R. BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	)	CASE NO. 252811 DEPT. NO. VIII NOTICE OF APPEAL (Filed January 27, 1987)

TO: THE HONORABLE GARY DAVIS, JUDGE, NORTH LAS VEGAS MUNICIPAL COURT;

TO: CITY OF NORTH LAS VEGAS, NEVADA:

NOTICE IS HEREBY GIVEN that Petitioner/Appellant, MELVIN R. BLANTON, by and through his attorney of record, JOHN J. GRAVES, JR., ESQ., appeals the "Decision and Order" of the District Court dated and filed January 14, 1987, denying his Petition for Writ of Mandamus requesting a jury trial on Blanton's misdemeanor charge of driving under the influence of intoxicating liquor (first offense), to the Nevada Supreme Court.

DATED this 16th day of January, 1987.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for
601 South Sixth Street
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of January, 1987, I served the foregoing NOTICE OF APPEAL on the following attorney by depositing copies of same in sealed envelopes in the United States Mail, postage fully prepaid, addressed as follows:

ROY A. WOOFTER, ESQ.
North Las Vegas City Attorney
2200 Civic Center Drive
North Las Vegas, Nevada 89030

D. BRIAN MCKAY, ESQ.
Attorney General
Capitol Complex
Carson City, Nevada 89710

/s/ Honorine E. Fugitt
Honorine E. Fugitt, an employee of
GRAVES, LEAVITT & KOCH

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Appellant, vs. MARK D. FRALEY, Respondent.	)	Case No. C 76512 Dept. No. XI Docket No.

DEMAND FOR JURY TRIAL

Hearing Date: ___
Hearing Time: ___

(Filed January 29, 1987)

COMES NOW, Defendant, MARK D. FRALEY, by and through his attorney JOHN G. WATKINS, ESQ. and requests an Order pursuant to Article I, Section 3 of the Nevada Constitution and the Sixth Amendment of the United States Constitution directing that the instant case be tried by jury.

This Motion is made and based upon the Points and Authorities filed herewith and all testimony as may be adduced at the hearing of this Motion.

DATED this 29th day of January, 1987.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by Jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

The United States Constitution, the Sixth Amendment holds,

> *"In all criminal prosecutions,* the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

Cf., *State v. Smith,* 99 Adv. Op. 172 (1983) (*State v. Smith,* is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith,* supra.) See also *Bronson v. Swinney,* et. al., #CV-R-86-130-ECR (Dist. Ct. of Nev., 10/1/86) where the court held that a defendant is constitutionally entitled to a jury trial in D.U.I. misdemeanor cases.

Respectfully submitted,

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing DEMAND FOR JURY TRIAL is hereby acknowledged this 29th day of January, 1987.

ROY A WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By: /s/ Mark L. Zalaoras
Mark L. Zalaoras
Deputy City Attorney

DISTRICT COURT
CLARK COUNTY, NEVADA

MARK D. FRALEY, Appellant, vs. CITY OF NORTH LAS VEGAS, Respondent.	)	Case No. C 76512 Dept. No. XI Docket No.

DECISION AND ORDER

(Filed February 13, 1987)

Appellant seeks relief in this Court through appeal pursuant to NRS 266.595. He asserts that he was denied his constitutional right to a jury trial by the municipal court below.

The first issue to be decided is whether an individual is constitutionally entitled to a jury trial for alleged violations under NRS 484.379, misdemeanor D.U.I. If the answer is in the affirmative then a second issue arises.

Can NRS 266.550 be used to deny a constitutionally guaranteed right to trial by jury?

It must first be noted that Municipal courts are constitutionally authorized and created by the legislature. See Article 6, Section 1 of the Nevada Constitution. This does not make them inferior but rather, once created, they exist as a co-equal branch of local government and are part of the constitutional judicial system of this state. See *City of North Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 550 P. 2d 399 (1976). The functions of the municipal court are as truly judicial in character as those of any other court of this state. The constitutional umbrella of protection extends to all courts of this state in exercising their judicial functions. Id. at 295.

In *Bronson v. Swinney*, CV-R-86-130-ECR (10-1-86), Federal District Judge Edward C. Reed held that individuals are constitutionally entitled and guaranteed a trial by jury when charged with a violation of NRS 484.379. This Court agrees with Judge Reed's analysis that these offenses are indeed "serious" and finds his decision to be "persuasive authority". NRS 484.379 convictions require mandatory jail (or performance of forty-eight hours of community work wearing distinctive garb indicating that the person has violated the D.U.I. law), automatic revocation of an individuals driving privilege for ninety days and can be used to enhance punishment requiring mandatory incarceration in the Nevada State Prison. *State v. Smith*, 99 Nev. 806, 672 P. 2d 631 (1983) was a pre-1983 NRS 484.379 violation which did not require mandatory jail or automatic revocation of the drivers license and is therefore distinguishable.

This court believes that individuals such as Appellant have a constitutional right to a jury trial. Further, any statute which denies this right is unconstitutional.

GOOD CAUSE Appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that individuals charged with violations of NRS 484.379 as amended in 1983 are constitutionally entitled to a jury trial.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in so far as NRS 266.550 prevents or denies jury trials for D.U.I. misdemeanor cases, it is unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above entitled case is remanded to the North Las Vegas Municipal Court for a jury trial on the D.U.I. charge.

DATED this 12th day of February, 1987.

Myron E Leavitt
DISTRICT JUDGE

for Addeliar D. Guy

Submitted by:

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Appellant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

CASE NO:

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS, NEVADA,
Petitioner,

vs.

ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
(Filed April 13, 1987)

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MARK L. ZALAORAS, being first duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of Nevada and is a Deputy City Attorney for the City of North Las Vegas, Nevada.

2. That he is the prosecuting attorney assigned by the City Attorney for the City of North Las Vegas to prosecute the Eighth Judicial District Court case number C76512,which is a misdemeanor appeal before such Court from the conviction of Mark D. Fraley for Driving Under

the Influence of Intoxicating Liquor entered on October 23, 1986 by the Honorable Gary Davis, Judge of the Municipal Court for the City of North Las Vegas, Nevada,

3. That he has personal knowledge of the events described herein based upon his position as prosecutor for the original Municipal Court case as well as for the appeal of the misdemeanor conviction.

4. That his Petition by affidavit is brought as an application for a writ of certiorari pursuant to NRS 34.010 through NRS 34.140; that jurisdiction for issuance of such a writ is based upon NRS 34.020(2) and (3) because Respondent exceeded the jurisdiction of his office during the exercise of judicial functions by entering an order remanding the appeal to the North Las Vegas Municipal Court without holding a trial de novo on appeal, and by ruling that NRS 266.550 is unconstitutional as it denies jury trials to persons charged with misdemeanor DUI offenses. That there is no appeal from such order, nor does Petitioner have any plain, speedy or adequate remedy.

5. That Petitioner seeks review of the Decision and Order entered on or about February 13, 1987 by the Honorable Addeliar D. Guy in case number C76512 in the Eighth Judicial District Court of the State of Nevada, a copy of which is attached hereto as Exhibit "A".

6. That good cause exists for review by this Court of such order in that District Judge Guy granted a pretrial motion by Appellant Mark Fraley which challenged the Municipal Court conviction for failure to provide a jury trial and remanded the case for a trial by jury; that such action by Respondent exceeded his jurisdiction by not

conducting a new trial on the appeal as required for appeals to district from municipal courts; that the order by Respondent declared NRS 266.550 to be unconstitutional as it denies jury trials to persons charged with misdemeanor DUI offenses, whereas this Court in *State v. Smith*, 99 Nev. 806 (1983) held that such persons are hot entitled to trial by jury, and therefore the Respondent further exceeded his jurisdiction by such order.

WHEREFORE, Affiant prays that a writ of certiorari or other appropriate writ may be issued out of this Court to the Judge of the Eighth Judicial District Court, Department No. XI, the Honorable Addeliar D. Guy, commanding him to certify and return to this Court copies of all motions, pleadings, findings, orders, rulings, judgments, minute orders, and records on file, and Affiant further seeks a stay of proceedings in both the Municipal Court for the City of North Las Vegas and the Eighth Judicial District Court of the State of Nevada pending final determination of this application, and ultimately for an order from this Court commanding Respondent to make a determination of the misdemeanor appeal filed by Appellant Mark Fraley based upon a trial de novo before that Court, and for such other and further relief as may be proper in the premises.

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By /s/ MARK L. ZALAORAS
MARK L. ZALAORAS
Deputy City Attorney
Attorney for Petitioner

SUBSCRIBED and SWORN to before me
this 8th day of April, 1987.
/s/ Sarah Lee Johnson
Notary Public

STATEMENT OF THE ISSUES

I. Whether Respondent exceeded his jurisdictional authority by reversing the conviction obtained in Municipal Court and remanding the case to that Court for a new trial by jury instead of deciding the misdemeanor appeal on a trial de novo?

II. Whether Respondent exceeded his authority by ruling that NRS 266.550 is unconstitutional as it denies persons charged with misdemeanor DUI offenses a jury trial?

A. Whether the ruling in *State v. Smith*, 99 Nev. 806 (1983) is controlling authority on the jury trial issue in view of the legislative amendments to NRS 484.379 since the *Smith* decision in 1983?

B. Whether a federal constitutional right to trial by jury for misdemeanor DUI offenses should be recognized by this Court in light of the Federal District Court ruling by the Honorable Edward C. Reed in *Bronson v. Swinney*?

REASONS WHY WRIT SHOULD ISSUE

Petitioner is without any plain, speedy and adequate remedy other than certiorari to rectify the action by Respondent in remanding the case to Municipal Court and ruling NRS 266.550 unconstitutional. Specifically, NRS 34.020(3) mandates that the writ of certiorari be granted by the Supreme Court upon application of a municipality where a district court has passed upon the constitutionality or validity of a statute or municipal ordinance in a case prosecuted for the violation of such statute or ordinance.

In addition, NRS 34.020(2) requires the writ to be granted in all cases where an inferior tribunal during the exercise of judicial functions exceeds its jurisdiction and there is no appeal, nor any plain, speedy and adequate remedy. In this case the City of North Las Vegas is prohibited from taking a direct appeal to this Court by the terms of Article 6, Section 6 of the Nevada Constitution, which declares that district courts shall have final appellate jurisdiction in cases arising in inferior tribunals. Therefore, a writ of certiorari is the proper device by which Petitioner may have its grievance with Respondent remedied.

There is a split of authority among the various Departments of the Eighth Judicial District Court concerning the jury trial issue for misdemeanor DUI prosecutions. At least three other Departments, numbers VI, VII and VIII, have ruled opposite from Respondent on this issue and denied a jury trial request on appeal. A writ must issue from this Court so that it can hear and determine the legal issue in order for the conflict among the Departments of the Eighth Judicial District Court to be resolved. Moreover, there are currently pending several other cases before this Court regarding the same issue. To the extent it may be practical, Petitioner asks that its case be consolidated with those other matters.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

RESPONDENT EXCEEDED HIS JURISDICTIONAL AUTHORITY BY REVERSING THE MISDEMEANOR CONVICTION AND REMANDING THE CASE TO MUNICIPAL COURT FOR A JURY TRIAL

Upon conviction in a municipal court of this state, a defendant has the right to appeal to the district court. NRS 266.595, NRS 5.080 and NRS 189.010. Such appeal takes the form of a trial de novo. NRS 266.565. But see NRS 266.005 which renders Chapter 266 inapplicable to charter cities. This trial on the appeal is before the bench and without a jury. *State v. Smith*, 99 Nev.806 (1983). See also *Hudson v. City of Las Vegas*, 81 Nev. 677 (1965), *City of Las Vegas v. O'Donnell*, 100 Nev. 491 (1984) and NRS 266.550.

Once an appeal is taken from a misdemeanor conviction, there is no provision in statutory or case law for the district court hearing the appeal to reverse the judgment of the municipal court and remand the case for a new trial. Respondent herein acted without authority in so doing and thereby exceeded his jurisdiction. The proper procedure would have been for Respondent to enter his judgment based upon a trial de novo.

In *City of Las Vegas v. O'Donnell*, 100 Nev. 491 (1984), the district court remanded the misdemeanor appeal to the municipal court for a new trial and was held to have exceeded its jurisdiction by so doing. The City of Las Vegas petitioned the Nevada Supreme Court for a writ of certiorari, challenging the action of the district court.

"In the present petition, the City of Las Vegas seeks a determination by this court that the district court exceeded its jurisdiction in remanding the case to the municipal court rather than holding a trial de novo itself. The City also contends that the district court erred in determining that the evidence of intoxilyzer tests should be suppressed at trial. We agree with the City with respect to both contentions.

First, the district court was clearly without jurisdiction to remand the case to the municipal court for a trial de novo. The district court was instead required to hold a trial de novo to determine for itself the question of Furniss' guilt or innocence. See NRS 266.565, supra, note 1. Upon remand, *the district court shall conduct such a trial.*" (Emphasis added). *Id.*, at page 493.

Hence, Respondent had no jurisdiction to vacate the lower court judgment. Unlike a typical appellate court process, the district court does not sit in a reviewing court posture, determining whether any error of law was committed by the lower court. Rather, the district court on a misdemeanor appeal from a municipal court must conduct a trial de novo. This Court must reverse the order of remand by Respondent and direct that a trial de novo be conducted at the district court level on appeal.

II.

RESPONDENT EXCEEDED HIS AUTHORITY BY RULING THAT NRS 266.550 UNCONSTITUTIONALLY DENIES A RIGHT TO TRIAL BY JURY TO PERSONS ACCUSED OF MISDEMEANOR DUI OFFENSES

Respondent entered a two-step ruling which declared that: (1) there is a federal constitutional right to trial by jury for a misdemeanor DUI charge under NRS 484.379

based upon the recent federal district court decision in *Bronson v. Swinney*, CV-R-86130 ECR (October 1, 1986) from the District of Nevada, opinion by the Honorable Edward C. Reed; and (2) that a statute providing otherwise is unconstitutional. See Exhibit "A" attached hereto, page 2 of the Decision and Order, lines 4-21. Petitioner submits that Respondent was in error in distinguishing the opinion of this Court in *State v. Smith*, 99 Nev. 806 (1983), which holds to the contrary.

A. *The ruling in State v. Smith, supra, is controlling authority on the jury trial issue, even in light of the legislative amendments to NRS 484.379 since 1983.*

Respondent is required to follow the pronouncement of this Court in *State v. Smith, supra,* which is controlling authority upon Respondent on the DUI jury trial issue. The accused, Mark Fraley, is not entitled to a jury trial for a misdemeanor DUI offense where the maximum authorized penalty is six (6) months in jail or less. In *Smith, supra,* this Court stated:

"Persons are guaranteed the right to a jury trial by both art I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefor turns upon whether the offense charged is characterized as "serious" or "petty." See Duncan

v. Louisiana, 391 U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, S.Ct. 1996 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).

In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.

At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .

Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

The amendments to NRS 484.379 made in 1983 and 1985 did not change the maximum authorized penalty for a misdemeanor DUI conviction. Those amendments did change the *minimum* penalty. The 1983 Legislature changed the minimum penalty from a fine of $100 and mandatory counseling to a $200 fine, mandatory counseling and either 2 days in jail or 48 hours of community service for a first offense, and the person must wear distinctive garb to identify himself as a DUI offender if performing the latter. NRS 484.3792. The maximum penalty for either a first or second DUI remains at six months in jail and/or a $1,000 fine. NRS 484.3792. The 1983 Legislature also amended the driver's license revocation law by mandating a ninety day revocation for a first offense DUI conviction and one year for a second offense. NRS 483.460

The 1985 Legislature did not change any of the penalty provisions for a misdemeanor DUI. It did increase the maximum authorized penalty for a felony DUI from six years to twenty years. NRS 484.3795.

It is clear from the above analysis that the holding in *State v. Smith, supra,* remains viable even in light of the amendments to the DUI law since the time of that decision. Therefore, Respondent exceeded his authority in distinguishing that ruling as there is no right to a jury trial for a misdemeanor DUI.

B. *There is no federal constitutional right to trial by jury for misdemeanor DUI offenses.*

1. Decisions of federal courts are not automatically binding upon state courts.

The powers of the federal judiciary are specified in the Constitution of the United States and the statutes

enacted by the Congress of the United States. Article III, Section 1 of the Constitution states that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2 of Article II further illuminates the issue by noting that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

It is clear from the above language that inferior federal courts were intended to have judicial power only over specific cases and controversies involving federal issues. They are not authorized to decide abstract matters or to bind state courts except to the extent that a particular case or controversy arises from a state court. The United States Code has not given any additional powers to the federal courts and maintains this case or controversy limitation.

> 28 USC § 1331 - The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
>
> 28 USC § 3231 - The district courts of the United States shall have original jurisdiction, exclusive of the States, of all offenses against the laws of the United States.

Obviously the federal courts are limited in their jurisdiction to specific actions. This same limitation applies to the highest court in the land, the Supreme Court. In one of the earliest decisions of the Supreme Court, Article III of the Constitution was interpreted to preclude any court

in the United States federal system from acting in an advisory capacity or rendering decisions on general issues, rather than on a case by case basis involving actual controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). However, because the Supreme Court is the ultimate authority on federal questions and issues, its decisions, while not binding except in a particular case, are considered to be the most definitive statement of the law which was at issue in that case and therefore upon that specific federal question. (Most states also have provisions of their state constitutions or statutes which acknowledge the United States Supreme Court as the controlling authority in the interpretation of federal issues, see Article 1, Sec. 2. of the Nevada Constitution.)

While the reiteration of the above provisions of the Federal Constitution and Statutes may seem to be superfluous, it is important that they be recognized since they are the building blocks for the case law involving the authority of a federal court to bind a state court. Too often it is assumed that a federal court is directly superior to a state court, when in reality, the two systems are distinct and separate from each other; the federal system acts only as a method of checks and balances against improper activity by state courts. The dichotomy between the federal and state judicial systems is well recognized in the State of Nevada. In *Bargas v. Warden*, 87 Nev 30, 482 P.2d 317 (1971), the Supreme Court of the State of Nevada noted that:

> We are bound by the decisions of the United States Supreme Court (Nevada Constitution, Article 1, Sec. 2.). We are not bound by the decisions of the other federal courts, *Bargas* at 32.

Nevada is not alone in its view regarding the force and effect of federal decisions. In *People v. Luros*, 480 P.2d 633, 92 Cal. Rptr. 833 (1971), the Supreme Court of California in an *en banc* decision, rejected the interpretations of several federal courts noting that the federal courts were not "compelling authority" and citing to the California case most known for outlinging the division between federal and state courts, *In Re Whitehorn*, 1 Cal. 3rd 504, 462 P.2d 361 (1969).

Similarly, the Supreme Court of Idaho, in *State v. Harmon*, 685 P.2d 814 (1984) indicated that while it might give deference to federal district court opinions, it was in no way bound by them. Citing to the premiere federal case in this area, *United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. Ill.) *cert. den.* 402 U.S. 983 (1970), the Idaho Court noted that federal district court rulings do not bind state courts in unrelated cases.

Finally, in one of the most succinct statements of the law in this area, the Court of Criminal Appeals of Oklahoma, in *Dean v. Crisp*, 536 P.2d 961 (1975), stated that:

> . . . The federal courts have no jurisdiction except in those areas which are concerned with interpretation of the United States Constitution. The inferior federal courts exercise no appellate jurisdiction over state tribunals. Therefore, decisions from these federal courts are not conclusive on state courts. . . .The decisions of the Federal Circuit Court of Appeals in *Lamb*, supra, and *Radcliff*, supra, do not establish binding precedent on this Court until the issue is answered by the United States Supreme Court. The inferior federal courts exercise their power only on a case-to-case basis and can extend their power no further. *Dean* at 963.

Of course the Court in *Dean* also noted that federal case law is often persuasive and the Nevada Supreme Court has also so indicated in *Rahn v. Warden*, 498 P.2d 1344 (1972), where the Nevada High Court acquiesced in the decisions of the Ninth Circuit Court of Appeals.

In *Bronson v. Swinney, supra*, the authority relied upon by Appellant below, Mark Fraley, to support his argument for a jury trial, the Federal Court had before it a Writ of Habeas Corpus arising out of a conviction for DUI originating in the Justice's Court for Reno. The granting of the Writ and the Court's Order for a jury trial on remand are only binding upon the original Justice's Court, and only in that particular case. The federal order is not binding upon a municipal or district court in the instant situation. A court's holding is always limited to those issues which are necessary to decide the case. All other commentary is *dictum* and not precedent. Since Judge Reed's minor reference to municipal courts was not necessary to a resolution of the case, it would not be binding.

Given the above case law, it is clear that neither the North Las Vegas Municipal Court nor the District Court are bound by the *Bronson* decision. Moreover, the State of Nevada has not chosen to acquiesce to federal court rulings in this area and the Respondent should not have voluntarily taken notice of the *Bronson* ruling and granted Appellant's Motion.

2. First and second offense DUI violations are "petty offenses" under federal constitutional law and defendants are not entitled to trials by jury.

A review of the United States Constitution and Supreme Court case decisions is necessary for a complete

understanding of the issues involved with the DUI jury trial question. Article III, Section 2, paragraph 3 of the United States Constitution states that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ."

This language was later supplemented by the Sixth Amendment which provides that:

> . . .
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

On its face, the Constitution would seem to impose the right of trial by jury in all federal criminal cases, bearing in mind that Article III deals only with the federal government and federal crimes. Despite this language, however, the Supreme Court of the United States, as the ultimate authority on the meaning of the Constitution, decided as early as 1888, in *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, that the language in the Constitution must be viewed in light of the times in which it was written. Thus the Supreme Court has consistently held that the right to a jury trial was never intended to apply to those crimes which were considered to be "petty offenses" at common law. The Court has on numerous occasions reiterated this distinction between "petty" and "serious" offenses and has extended the concept to statutory crimes. *Cheff v. Schackenberg*, 384 U.S. 373, 86 S.Ct. 1523 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660 (1937); *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826 (1904), *Natal v. Louisiana*, 139 U.S. 621, 11 S.Ct. 636 (1891).

In the landmark case of *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), when the Supreme Court held that by virtue of the Fourteenth Amendment, the Sixth Amendment right to trial by jury also applied to state criminal proceedings, the High Court again restated its position with regard to the limitations between "serious" and "petty" offenses.

> . . . It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not· . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," . . . of the crime in question.
>
> . . . So-called petty offenses were tried without juries both in England and in the Colonies and have always been exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established commonlaw practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. . . .In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass on the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial, or where the legislature has not addressed itself to the problem, themselves face the questions in the first instance . . .

> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation.

The *Duncan* Court then went on to note that both at common law and in federal statutes, the dividing line between "petty" and "serious" offenses was a maximum jail sentence of six months. The Court also indicated, in Footnote 35, that with the exception of criminal contempt offenses, the relevant penalty to be considered was the possible maximum sentence which could be imposed not the actual sentence levied against the defendant.

Subsequent to *Duncan,* the Supreme Court has written several decisions which clarify the manner in which a crime is to be classified as "petty" or "serious" and stresses that the amount of jail time which could be imposed is to be considered the most important, almost exclusive, factor in making such a determination. The first of these cases is *Frank v. United States,* 395 U.S. 147, 89 S.Ct. 1503 (1969). *Frank* dealt with a criminal contempt charge arising out of the violation of an administrative ruling. The Court succinctly reviewed the steps a court should take in deciding whether or not a jury trial is warranted.

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the seriousness with which society regards the offense. . . .The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission.
>
> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed,

> is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense."

Frank also held that collateral consequences of a conviction, if contemplated within the definition of "petty" by the legislature, would not remove an offense from the "petty" category. Thus the Court in *Frank* rejected the claim that a three year sentence of probation made an otherwise "petty" offense a "serious" one for purposes of a jury trial and noted that:

> "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself."

The next major federal case dealing with jury trials is *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886 (1970). In *Baldwin,* the defendant was charged with a crime which was punishable by up to one year imprisonment and which by statute could not be tried by jury. It was in *Baldwin* that the Supreme Court established the outer limit for the dividing line between "petty" and "serious" crimes. Any offense which carried a penalty in excess of six months in jail would be "serious", those whose maximum jail time did not exceed six months would be "petty". The Court made no mention of other factors, such as the amount of the fine, except to briefly refer to the $500.00 fine limit contained in the federal definition of "petty" under 18 USC § 1. The majority of the opinion centers around the issue of imprisonment and the need for objective criteria to make a determination.

> ". . . This near-uniform judgment of the Nation [that any jail time over six months removes a crime from the 'petty' offense category] furnishes us with the only objective criterion by which a line could ever be

drawn-on the basis of the possible penalty alone-between offenses that are and that are not regarded as 'serious' for purposes of trial by jury.

Of necessity, the task of drawing a line 'requires attaching different consequences to events which, when they lie near the line, actually differ very little.' *Duncan*, supra, at 161, 20 L.Ed. 2d at 502. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced the appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercusions affecting his career and his reputation. Where the accused cannot possibly face more than six months's imprisonment, we have held that these disadvantages, onerous as they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications."

Baldwin clearly sets forth the type of "balancing" test the Supreme Court recommends in all cases involving the jury trial issue. However, lower courts and numerous attorneys have taken *Baldwin* out of context. For example, the national standards language of Baldwin has been referred to by Judge Reed in *Bronson* and by the Ninth Circuit in some opinions as supporting grounds for the granting of jury trials in DUI cases. *United States v. Craner*, 652 F.2d 461 (9th Cir. 1976). The reasoning stated is that since the majority of states do grant a defendant a jury trial for DUI offenses, then this is a reflection by the "nation" that the offense is a serious one. While many states do allow for jury trials in DUI cases, they also allow jury trials in most misdemeanor cases, that is most cases where the penalty does not exceed six months' in jail. Those states which still punish DUI by penalties

which do not exceed the six month standard still consider the offense as "petty." These states have not redefined "petty", instead they have simply determined that jury trials should be granted in all crimes, petty or not, either because their state constitutions require jury trials in all criminal matters and are broader in scope than the federal constitution, or because state legislatures have enacted statutes providing for jury trials in petty offense cases. Nationally, the standard for defining a "petty" offense still turns primarily around the maximum possible jail sentence and the six month rule. *Codispoti Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687 (1974); *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2687 (1974).

For some years after *Duncan*, the Supreme Court did not rule on the relationship of fines to "petty" offense. This changed with the rendering of the decision of the Court in *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975). The Court in *Muniz* noted that while the six month guideline had been taken in part from the statutory definition of a "petty offense" contained in 18 USC § 1(3) ($500.00 fine and/or six months imprisonment) this did not mean that any fine which exceeded $500.00 would automatically cast the offense into the serious category. *Muniz* involved a $10,000.00 fine which was imposed against a labor union in a contempt type proceeding. The High Court did not set any outside fine standard for jury puposes in *Muniz*, but it did indicate that fines are, to some extent, at the bottom of the considerations which are to be weighed.

> "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but

it is quite another to suggest that, *regardless of the circumstances* a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining, the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsicaily different." (Emphasis added). *Muniz* at 477.

Based upon a reading of the Supreme Court cases cited above, the Petitioner submits that no federal grounds existed for Respondent to grant the Motion to Dismiss for lack of a jury trial. The fact that Nevada's statute requires mandatory, as opposed to discretionary, imposition of imprisonment is irrelevant, since the Supreme Court stated in *Duncan, supra,* that it is the potential, not the actual jail sentence which is important. The fact that the DUI statute contains provisions such as mandatory counseling and that a DUI conviction will result in collateral consequences (such as the loss of a driver's license or enhanced punishment on a second offense) is insufficient to mandate a jury trial. *Frank, supra,* contained an obvious statement of the High Court that regulatory provisions of sentencing, such as probation, do not take an offense out of the "petty" category if it is otherwise treated as a "petty" offense, that is, punishable by no more than six months in jail. As noted in *Baldwin, supra,* the fact that the conviction could result in serious consequences and repercussions does not control whether the crime is classified as "petty" or "serious." Finally, the mere fact that Nevada has chosen to impose a $1,000 fine, instead of a $500 fine, does not automatically remove the offense from the "petty" category, especially given the rulings of the Nevada Supreme Court in this area, specifically in *State v. Smith, supra.*

Considering the above analysis, it is difficult to agree with the reasoning of Judge Reed in *Bronson*. With all due respect to Judge Reed, the Petitioner submits that his opinion in *Bronson* presents an incomplete statement of the case law in this area and the rationale and policies set forth by the United States Supreme Court.

Judge Reed relied heavily upon two Ninth Circuit cases dealing with jury trial issues. *United States v. Craner,* 652 F.2d 461 (9th Cir. 1976) and *United States v. Sanchez-Meza,* 547 F.2d 461 (1976). The Petitioner's reading of both of these cases is that they represent attempts by the Ninth Circuit to expand the concept and scope of jury trials way beyond that established by the United States Supreme Court. The Petitioner does not agree with the reasoning of the Ninth Circuit in either case and argues that while the Ninth Circuit (absent an overriding ruling from the Supreme Court) can create a greater scope of jury trials in the federal courts under its appellate jurisdiction, its rulings are not binding upon the State of Nevada and are in direct contradiction with the case law established by the Supreme Court, which *is* binding upon Nevada. Moreover, both *Craner* and *Sanchez-Meza* concerned federal offenses taking place on federal land. Thus, interpretation of federal statutory law was involved, not state law.

Not every federal court agrees with *Craner*. In *United States v. Fletcher,* 505 F.Supp. 1053 (1981), the United States District Court for the Western District of Virginia not only summarily denied a request for a jury trial involving a DUI committed in a federal park, but also rejected the *Craner* and *Woods* concept of looking beyond

the authorized penalties. Indeed, the *Fletcher* Court specifically held that:

> . . . the revocation of the right to operate a vehicle upon the highways, . . . is not a part of the punishment provided by law to be fixed by a court or jury upon conviction of a crime. The revocation . . . follows as a consequence and effect of conviction for crime. *Fletcher* at 1054.

Another federal court has rejected the concept that courts should consider the treatment of the offense at common law or whether the offense is *malum in se*, again in direct conflict with *Craner*, *Woods* and *Sanchez-Meza*. The United States District Court for the District of Puerto Rico, in *Matoe v. Rodriquez*, 440 F. Supp. 673 (1976), firmly rejected the "nature of the offense" method of classifying crimes for purposes of jury trials. The Court gave great weight to the Supreme Court decision in *Frank, supra*, and stated that:

> . . . the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. It concluded that of the objective indicators, the most important is the severity of the sentence. In cases where the maximum penalty has been provided for in a statutory manner, the legislature has been said *to include within the penalty imposed a statement about the seriousness of the offense*. . . .
>
> . . . It is thus clear that the doctrine of *District of Columbia v. Colts*, supra, wherein the primary importance was given to the nature of the offense, is no longer applicable. *Matos* at 676, 677.

Even the Ninth Circuit has had occasion to backtrack with regard to its decision in *Craner*. In *United States v. Arbo*, 691 F.2d 862 (1982), the Ninth Circuit referred to its policy in *Craner*. In *Arbo*, the defendant was charged with a violation of both federal statute and a federal regulation. The Court noted that its decision in *Craner* was based on "extraordinary circumstances", that is the lack of legislative judgment because the offense arose from a federal regulation. But in *Arbo*, the Court said no extraordinary circumstances existed since the defendant was charged under a federal statute, which did show legislative judgment that the crime should be a petty offense and triable without a jury.

In addition to the *Arbo* decision, the Ninth Circuit has, in one other opinion, apparently recanted, at least in part, the doctrine in *Craner*. In *United States v. Jenkins*, 734 F.2d 1322 (1983), the Court found that the imposition of a two year probation period under the Youth Corrections Act did not create extraordinary circumstances warranting a jury trial; that this collateral consequence did not remove the offense from the petty category because it was punishable by not more than six months in jail. (*Jenkins* involved a simple assault.)

Given the detailed review of the case law contained in this Brief of the decisions of the United States Supreme Court, together with an in depth reading of the decisions of the Ninth Circuit, which are often ambiguous at best, it is evident that DUI offenders in the State of Nevada, and, more specifically, those charged in the Municipal Court of North Las Vegas, do not have a constitutional right to a trial by jury.

For the reasons heretofore stated, the Petitioner requests that the Court reverse the decision and order of

Respondent and remand the case to the Eighth Judicial District Court for a trial de novo without a jury.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

APPELLANT'S OPENING BRIEF

(Filed June 22, 1987)

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I

STATEMENT OF THE CASE AND RELEVANT FACTS

On or about July 18, 1986, Defendant/Appellant MELVIN BLANTON was arrested by an officer of the North Las Vegas Police Department for driving under the influence of intoxicating liquor (N.R.S. 484.379), and so charged in a "first offense" criminal complaint on or about July 18, 1986.

On or about October 3, 1986, Defendant, by and through counsel, filed a Demand for Jury Trial, which Demand was orally denied by the Honorable Gary Davis, Judge of the Municipal Court, North Las Vegas, Nevada.

A Petition for Writ of Mandamus asserting Defendant's right to a jury trial in a first offense DUI prosecution was filed in the Eighth Judicial District Court on November 3, 1986, the Honorable Michael Wendell. The Petition was exclusively based upon federal law and the decision rendered by Federal District Judge Edward Reed in *Bronson v. Swinney*, on September 26, 1986, granting a jury trial to Petitioner Bronson in that case. Judge Wendell denied Defendant's Petition for Writ of Mandamus in a formal Order of January 14, 1987, from which Defendant filed a Notice of Appeal to this Court on January 20, 1987.

II

ISSUE

Whether the United States or Nevada Constitutions Require a Jury Trial, Upon Demand, for a Defendant Charged With First Offense Driving Under the Influence of Intoxicating Liquor, a Misdemeanor, in a

Municipal Court, Notwithstanding the Statutory Mandate of N.R.S. 266.550 Requiring a Trial to the Bench in All Misdemeanor Municipal Court Trials.

III

LEGAL MEMORANDUM

A.

A Jury Trial in a DUI Prosecution is Required Upon Demand in Municipal Court Pursuant to the United States and Nevada Constitutions

N.R.S. 266.550 states:

> Powers and jurisdiction of court same as justice's court; trial summary and without jury.
>
> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justices' courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature; but the trial and proceedings in such cases shall be summary and without a jury. (1907, p.265; RL 1912, Sec. 832; CL 1929, Sec. 1167.)

The Nevada Constitution, Article 1, Section 3, states:

> Sec: 3. Trial by jury; waiver in civil cases.
>
> The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

The Nevada Constitution, Article 1, Section 8 states:

Section 8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.

No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

The Sixth Amendment to the United States Constitution states:

AMENDMENT VI

[Rights of Accused in Criminal Prosecutions]

Rights of accused in criminal prosecutions.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), held that "crimes carrying possible penalties up to six months in custody do not require a jury trial if they otherwise qualify as petty offenses." Duncan, 88 S.Ct. 1453.

The Court further found at 88 S.Ct. 1453, that:

> . . . the penalty authorized for a particular crime has major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment . . .

Duncan itself instructed that a national standard be utilized to determine whether a jury trial is required upon demand for certain offenses. 391 U.S. 161, 88 S.Ct. 1453. Exhibit "A" attached hereto shows that forty-seven (47) States allow Jury Trials in DUI cases specifically or in misdemeanor cases in general. See *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

There are several important ramifications involved in a first conviction of misdemeanor D.U.I. in the State of Nevada:

> 1. Defendant must choose between two (2) days imprisonment or perform forty-eight (48) hours of work for the community which computes to six (6) days at eight (8) hours per day. N.R.S. 484.3792(1)(a)(2).

2. Defendant must wear "distinctive garb" while performing this community service, which garb must identify him as a violator of the DUI laws.

3. A mandatory minimum fine of $200.00 but not more than $1,000.00. N.R.S. 484.3792(1)(a)(3).

4. Defendant must complete at his own expense, usually $175.00 or greater, an educational course on the abuse of alcohol and controlled substances approved by the Department of Motor Vehicles, and complete the course within the time specified in the Order of the Court. N.R.S. 484.3792(1)(a)(1).

5. Suffer a mandatory ninety (90) day suspension of his driver's license. N.R.S. 484.460(1)(c).

6. Suffer almost certain insurance premium increases, and the

7. Social stigma of being a convicted "drunk driver".

The criminal charge of D.U.I. is a misdemeanor which carries a maximum period of incarceration of six (6) months in the local County Jail and a maximum fine of $1,000.00. N.R.S. 484.3792.

Upon a second conviction of D.U.I. within seven (7) years, a defendant must be sentenced to a mandatory minimum period of ten (10) days incarceration, and a fine of not less than $500.00. N.R.S. 484.3792(1)(b). Upon a third charge of D.U.I. within seven (7) years, the charge becomes a felony punishable by imprisonment for not less than one (1) year nor more than six (6) years, in a minimum security institution, honor camp, restitution center, or similar facility, and defendant must be fined not less than $2,000.00 nor more than $5,000.00. N.R.S. 484.3792(c).

Equally important is that no D.U.I. charge is dismissable or negotiable by the prosecuting authorities "unless (the prosecuting attorney) knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial." N.R.S. 484.3792(3).

Again, the United States Supreme Court, in *Duncan, supra,* stated that a national standard be utilized in determining whether a Jury Trial is mandated for a particular offense, at 88 S.Ct. 1453:

> In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937), supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500.00 fine. . . . (Emphasis and parenthetical material added.)

See also, *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), wherein the Court reviewed legislative reenactments of the death penalty in one form or another after *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in these words, at 96 S.Ct. 2928:

> The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the

> Court in Furman primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

The national standards reflected in the allowance of Jury Trials for D.U.I. charges in forty-seven (47) States clearly mandate a Sixth and Fourteenth Amendment requirement that a Jury Trial be allowed, at a defendant's request, in a D.U.I. trial. The draconian consequences attendant to such a conviction, in their own right, lend strength to the imposition of a jury between the accused and the force of the State or prosecuting attorney.

B.

The Federal District Court for the District of Nevada Has Ruled That As A Matter of Federal Constitutional Law, A Defendant Charged With Driving Under the Influence of Intoxicating Liquor Has the Right to A Jury Trial

This Court is referred to the well-reasoned decision of Judge Edward Reed, attached hereto as Exhibit "B", in the case of *Bronson v. Swinney*, CV-R-86-130-ECR, filed October 1, 1986, in the United States District Court for the District of Nevada. Without reiterating the law in that decision in the opening brief proper, the law and reasoning of that decision is urged upon this Court. The *Bronson* case is now stuck in the Ninth Circuit awaiting a current ruling by this Court on this issue, since Bronson's attorney neglected to exhaust his State remedies before galloping into the federal system.

See also *United States v. Craner*, 652 F.2d 23 (CA9 1981), allowing jury trials for first-time DUI offenders in federal court.

C.

The United States Court of Appeals for the Ninth Circuit Has Ruled In a State Case That A Potential Fine of $1,000.00 Triggers the Right To A Jury Trial

In *Rife v. Godbehere*, 814 F.2d 563, 565 (CA9 1987), the Ninth Circuit ruled that an Arizona State Defendant charged with a Class I misdemeanor punishable by a fine of up to $1,000.00 was entitled to a jury trial. The Court followed the rule in *United States v. Hamdan*, 552 F.2d 276 (CA9 1977) which granted a jury trial on a federal charge of the making of false statements in documents filed with the Immigration and Naturalization Service, where a potential fine of $1,000.00 existed. *Rife* extends this rule to a State offense punishable by a potential fine of $1,000.00. Inasmuch as a first-offense D.U.I. charge carries a potential fine of $1,000.00, a jury trial is required on this separate legal basis and case.

IV

CONCLUSION

N.R.S. 266.550 cannot withstand the tide of federal constitutional law cited above. This Court is not asked to hold the statute unconstitutional for all purposes (misdemeanor crimes), as the *Rife* case might strongly suggest; but this Court is urged to construe N.R.S. 266.500 inapplicable to DUI offenses pursuant to the federal and state constitutional provisions enumerated above. This would

allow Defendant BLANTON his jury trial in North Las Vegas Municipal Court.

DATED this 19th day of June, 1987.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

• • • • • •

CITY OF NORTH LAS VEGAS, NEVADA, Petitioner, vs. ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondent.	)	Case No. 18065

ANSWER TO PETITION FOR
A WRIT OF CERTIORARI

(Filed July 1, 1987)

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A. INDIVIDUALS CHARGED WITH VIOLATING NRS 484.379 SUBSEQUENT TO JULY 1, 1983 ARE CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY AS THE OFFENSE IS "SERIOUS" AS OPPOSED TO "PETTY"

B. SINCE AN INDIVIDUAL HAS A RIGHT TO A JURY TRIAL FOR NRS 484.379 VIOLATIONS, NRS 266.550 IS UNCONSTITUTIONAL

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

CITY OF NORTH LAS VEGAS, NEVADA, Petitioner,	)	Case No. 18065
vs.	)	
ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondent.	)	

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

FACTS

Defendant, MARK D. FRALEY, was arrested for "Driving under the influence of intoxicating liquor" hereinafter referred as D.U.I. and was scheduled for trial in the North Las Vegas Municipal Court. Fraley file a written demand for trial by jury. The municipal judge denied the request and subsequently convicted Defendant of the D.U.I. charge. An appeal was filed in the Eight Judicial District Court.

One issue raised on appeal was the denial of the right to be tried by jury. The Honorable Addeliar D. Guy considered briefs and arguments of the respective parties and held that all defendants charged with D.U.I.'s subsequent to July 1, 1983 are constitutionally entitled to a trial by jury if desired. He further ruled that NRS 266.550 in so far as it prevents or denies jury trials in municipal courts, is unconstitutional. Counsel for the City of North Las

Vegas filed a Petition for Writ of Certiorari in this Court. Two issues arise from these facts (1) Are individuals charged with D.U.I. offenses under NRS 484.379 entitled constitutionally to a jury trial? and (2) Is NRS 266.550 unconstitutional? If the answer to the former is negative then the second issue becomes moot. On the other hand if jury trials are constitutionally guaranteed the second issue is alive and must be considered accordingly.

ISSUES

I.

ARE INDIVIDUALS CHARGED WITH VIOLATING OFFENSES UNDER NRS 484.379 CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY?

II.

IS NRS 266.550 UNCONSTITUTIONAL?

ARGUMENT

A.

INDIVIDUALS CHARGED WITH VIOLATING NRS 484.379 SUBSEQUENT TO JULY 1, 1983 ARE CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY AS THE OFFENSE IS "SERIOUS" AS OPPOSED TO "PETTY"

Individuals within Nevada's boundaries are constitutionally guaranteed trial by jury. The Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

Federal protection is also afforded the public. The Sixth Amendment of the United States Constitution holds,

> "*In all criminal prosecutions*, the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

This right to a jury trial is a fundamental one and is applicable to State proceedings through the 14th Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491, 88 S. Ct. 1444 (1968). It is well settled however that not all offenses require or trigger a trial by jury but rather only those which are "serious" as opposed to "petty". (It is worthy to note that even though an offense may be considered "petty" under the United States Constitution, the State constitution may require that it be deemed "serious" and guarantee a jury trial. A State is free to afford its citizens more rights than guaranteed by the federal constitution. However, it is this writer's position that under either constitution, a jury trial is guaranteed for NRS 484.379 violation). Characterizing a particular offense as either "serious" or "petty" is not automatic but rather requires considering a number of issues and factors. This was done in a well reasoned decision by Judge Reed in *Bronson v. Swinney*, CV-R-86-130 ECR (10-1-86) which should be adopted by this Court. C.f. *State v. Smith*, 99 Adv. Op. 172 (1983) (*State v. Smith*, is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith*, supra.) in addition to several other collateral consequences arising from a conviction. No one can honestly say that Nevada does not consider D.U.I.'s to be serious. A mere reading of this Court's opinions on D.U.I. related issues dispells

anything to the contrary. Such a strong position is warranted as "drinks are dangerous when they drive". However, it would be more dangerous if the government were allowed to take away a valuable right from its citizens. Under the circumstances that now exist, both the United States and Nevada Constitutions guarantee a trial by jury for offenses under NRS 484.379

B.

SINCE AN INDIVIDUAL HAS A RIGHT TO A JURY TRIAL FOR NRS 484.379 VIOLATIONS, NRS 266.550 IS UNCONSTITUTIONAL

Municipal courts are unconstitutionally authorized and created by the legislature. See Article 6, Section 1 of the Nevada Constitution. It is important to note that once municipal courts are established, they exist as a coequal branch of local government and are part of the constitutional judicial system of this state. See *City of North Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 550 P. 2d 399 (1976). The legislature is empowered to fix by law the jurisdiction of the municipal courts. See Article 6, Section 9 of the Nevada Constitution. NRS 266.555 sets the municipal courts' jurisdiction which includes D.U.I. cases. It is well settled that municipal courts once created are part of the constitutional judicial system. Equally true, the executive and/or legislative branches of state government may not exercise or restraint the judicial power. See *State ex rel. Watson v. Merialdo*, 70 Nev. 322, 268 P. 2d 922 (1954). Forbidding jury trials in municipal court amounts to the legislative branch undertaking the role of judicial power. This they cannot do. Therefore, NRS 266.550 is unconstitutional as to D.U.I. cases.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the above and foregoing ANSWER TO PETITION FOR WRIT OF CERTIORARI was deposited in the mail at Las Vegas, Nevada on this 30th day of June, 1987 addresses as follows: MARK L. ZALAORAS, Deputy City attorney, City of North Las Vegas, 2200 Civic Center Dr., North Las Vegas, Nevada 89030.

/s/ Barbara Watkins
An employee of JOHN G. WATKINS, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

RESPONDENT'S ANSWERING BRIEF

(Filed July 24, 1987)

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III.

ISSUE

WHETHER A PERSON CHARGED WITH A MISDEMEANOR DUI OFFENSE HAS A CONSTITUTIONAL RIGHT TO A TRIAL BY JURY IN VIEW OF LEGISLATIVE AMENDMENTS TO THE DUI LAW SINCE THE RULING IN *STATE V. SMITH* AND IN LIGHT OF THE RULING BY THE FEDERAL DISTRICT COURT OF NEVADA IN *BRONSON V. SWINNEY*?

IV.

STATEMENT OF THE CASE

The City of North Las Vegas adopts Blanton's version of the facts as stated in his Statement of the Case and Relevant Facts on page 1 of his "Appellant's Opening Brief", with the addition of the following facts, which were omitted by Blanton.

The City of North Las Vegas filed a Motion to Strike Demand for Jury Trial in the Municipal Court of North Las Vegas on or about October 9, 1986. At the same time Blanton's Demand for Jury Trial was denied by the Municipal Court, the City's Motion to Strike Demand for Jury Trial was granted. The Municipal Court stayed proceedings pending determination of the Petition for a Writ of Mandamus in the District Court.

V.

ARGUMENT

A.

THE RULING IN STATE v. SMITH IS CONTROLLING AUTHORITY ON THE JURY TRIAL ISSUE, EVEN IN LIGHT OF THE LEGISLATIVE AMENDMENTS TO NRS 484.379 SINCE 1983.

The pronouncement of this Court in *State v. Smith*, 99 Nev. 806 (1983) is controlling authority on the DUI jury trial issue. The accused, Melvin Blanton, is not entitled to a jury trial for a misdemeanor DUI offense where the maximum authorized penalty is six (6) months in jail or less. In *Smith, supra*, this Court stated:

> "Persons are guaranteed the right to a jury trial by both art I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefor turns upon whether the offense charged

> is characterized as "serious" or "petty." See Duncan v. Louisiana, 391, U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, S.Ct. 1996 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).
>
> In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U. S. 506, 94 S.Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.
>
> At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .
>
> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

The amendments to NRS 484.379 made in 1983 and 1985 did not change the maximum authorized penalty for a misdemeanor DUI conviction. Those amendments did change the *minimum* penalty. The 1983 Legislature changed the minimum penalty from a fine of $100 and mandatory counseling to a $200 fine, mandatory counseling and either 2 days in jail or 48 hours of community service for a first offense, and the person must wear distinctive garb to identify himself as a DUI offender if performing the latter. NRS 484.3792. The maximum penalty for either a first or second DUI remains at six months in jail and/or a $1,000 fine. NRS 484.3792. The 1983 Legislature also amended the driver's license revocation law by mandating a ninety day revocation for a first offense DUI conviction and one year for a second offense. NRS 483.460.

The 1985 Legislature did not change any of the penalty provisions for a misdemeanor DUI. It did increase the maximum authorized penalty for a felony DUI from six years to twenty years. NRS 484.3795.

It is clear from the above analysis that the holding in *State v. Smith, supra,* remains viable even in light of the amendments to the DUI law since the time of that decision. Therefore, there is no right to a jury trial for a misdemeanor DUI, as that offense must still be classified as "petty".

B.

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY JURY FOR MISDEMEANOR DUI OFFENSES.

1. Decisions of federal courts are not automatically binding upon state courts.

The powers of the federal judiciary are specified in the Constitution of the United States and the statutes enacted by the Congress of the United States. Article III, Section 1 of the Constitution states that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2 of Article II further illuminates the issue by noting that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

It is clear from the above language that inferior federal courts were intended to have judicial power only over specific cases and controversies involving federal issues. They are not authorized to decide abstract matters or to bind state courts except to the extent that a particular case or controversy arises from a state court. The United States Code has not given any additional powers to the federal courts and maintains this case or controvery limitation.

> 28 USC § 1331 – The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
>
> 28 USC § 3231 – The district courts of the United States shall have original jurisdiction, exclusive of the States, of all offenses against the laws of the United States.

Obviously the federal courts are limited in their jurisdiction to specific actions. The same limitation applies to the highest court in the land, the Supreme Court. In one of the earliest decisions of the Supreme Court, Article III of the Constitution was interpreted to preclude any court in the United States federal system from acting in an advisory capacity or rendering decision on general issues, rather than on a case by case basis involving actual controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). However, because the Supreme Court is the ultimate authority on federal questions and issues, its decisions, while not binding except in a particular case, are considered to be the most definitive statement of the law which was at issue in that case and therefore upon that specific federal question. (Most states also have provisions of their state constitutions or statutes which acknowledge the United States Supreme Court as the controlling authority in the interpretation of federal issues, see Article I, Sec. 2. of the Nevada Constitution.)

While the reiteration of the above provisions of the Federal Constitution and Statutes may seem to be superfluous, it is important that they be recognized since they are the building blocks for the case law involving the authority of a federal court to bind a state court. Too often it is assumed that a federal court is directly superior to a state court, when in reality, the two systems are distinct and separate from each other; the federal system acts only as a method of checks and balances against improper activity by state courts. The dichotomy between the federal and state judicial systems is well recognized in the State of Nevada. In *Bargas v. Warden*, 87 Nev 30, 482

P.2d 317 (1971), the Supreme Court of the State of Nevada noted that:

> We are bound by the decisions of the United States Supreme Court (Nevada Constitution, Article 1, Sec. 2.). We are not bound by the decisions of the other federal courts, *Bargas* at 32.

Nevada is not alone in its view regarding the force and effect of federal decisions. In *People v. Luros*, 480 P.2d, 633, 92 Cal Rptr. 833 (1971), the Supreme Court of California in an *en banc* decision, rejected the interpretations of several federal courts noting that the federal courts were not "compelling authority" and citing to the California case most known for outlining the division between federal and state courts, *In Re Whitehorn*, 1 Cal. 3rd 504, 462 P.2d 361 (1969).

Similarly, the Supreme Court of Idaho, in *State v. Harmon*, 685 P.2d 814 (1984) indicated that while it might give deference to federal district court opinions, it was in no way bound by them. Citing the premiere federal case in this area, *United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. Ill.) *cert. den.* 402 U.S. 983 (1970),the Idaho Court noted that federal district court rulings do not bind state courts in unrelated cases.

Finally, in one of the most succinct statements of the law in this area, the Court of Criminal Appeals of Oklahoma, in *Dean v. Crisp*, 536 P.2d 961 (1975), stated that:

> . . . The federal courts have no jurisdiction except in those areas which are concerned with interpretation of the United States Constitution. The inferior federal courts exercise no appellate jurisdiction over state tribunals. Therefore, decisions from these federal courts are not conclusive on state courts. . . . The

> decisions of the Federal Circuit Court of Appeals in *Lamb*, supra, and *Radcliff*, supra, do not establish binding precedent on this Court until the issue is answered by the United States Supreme Court. The inferior federal courts exercise their power only on a case-to-case basis and can extend their power no further. *Dean* at 963.

Of course the Court in *Dean* also noted that federal case law is often persuasive and the Nevada Supreme Court has also so indicated in *Rahn v. Warden*, 498 P.2d 1344 (1972), where the Nevada High Court acquiesced in decisions of the Ninth Circuit Court of Appeals.

In *Bronson v. Swinney*, 648 F.Supp. 1094 (D.Nev. 1986) the authority relied upon by Blanton to support his argument for a jury trial, the Federal Court had before it a Writ of Habeas Corpus arising out of a conviction for DUI originating in the Justice's Court for Reno. The granting of the Writ and the Court's Order for a jury trial on remand are only binding upon the original Justice's Court, and only in that particular case. The federal order is not binding upon a municipal or district court in the instant situation. A court's holding is always limited to those issues which are necessary to decide the case. All other commentary is dictum and not precedent. Since Judge Reed's minor reference to municipal court was not necessary to a resolution of the case, it would not be binding.

Given the above case law, it is clear that neither the North Las Vegas Municipal Court nor the District Court are bound by the Bronson decision. Moveover, the State of Nevada has not chosen to acquiesce to federal court rulings in this area and the District Court correctly chose

not to have taken notice of the *Bronson* ruling and denied Blanton's Petition.

2. First and second offense DUI violations are "petty offenses" under federal constitutional law and defendants are not entitled to trials by jury.

A review of the United States Constitution and Supreme Court case decisions is necessary for a complete understanding of the issues involved with the DUI jury trial question. Article III, Section 2, paragraph 3 of the United States Constitution states that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . "

This language was later supplemented by the Sixth Amendment which provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

On its face, the Constitution would seem to impose the right of trial by jury in all federal criminal cases, bearing in mind that Article III deals only with the federal government and federal crimes. Despite this language, however, the Supreme Court of the United States, as the ultimate authority on the meaning of the Constitution, decided as early as 1888, in *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, that the language in the Constitution must be viewed in light of the times in which it was written. Thus the Supreme Court has consistantly hold that the right to a jury trial was never intended to apply to those crimes which were considered to be "petty offenses" at common law. The Court has on numerous occasions reitereated this distinction between "petty" and

"serious" offenses and has extended the concept to statutory crimes. *Cheff v. Schackenberg*, 384, U.S. 373, 86 S.Ct. 1523 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660 (1937); *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826 (1904), *Natal v. Louisiana*, 139 U.S. 621, 11 S.Ct. 636 (1891).

In the landmark case of *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), when the Supreme Court held that by virtue of the Fourteenth Amendment, the Sixth Amendment right to trial by jury also applied to state criminal proceedings, the High Court again restated its position with regard to the limitations between "serious" and "petty" offenses.

> . . . It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," . . . of the crime in question.
>
> . . . So-called petty offenses were tried without juries both in England and in the Colonies and have always been exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established commonlaw practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury adjudications. . . . In the absence of an explicit constitutional provision,

> the definitional task necessarily falls on the courts, which must either pass on the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial, or where the legislature has not addressed itself to the problem, themselves face the questions in the first instance . . .
>
> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, to refer to objective criteria, chiefly the laws and practices in the Nation. 88 S.Ct. at 1453.

The *Duncan* Court then went on to note that both at common law and in federal statutes, the dividing line between "petty" and "serious" offenses was a maximum jail sentence of six months. The Court also indicated, in Footnote 35, that with the exception of criminal contempt offenses, the relevant penalty to be considered was the possible maximum sentence which could be imposed, not the actual sentence levied against the defendant.

Subsequent to *Duncan*, the Supreme Court has written several decisions which clarify the manner in which a crime is to be classified as "petty" or "serious" and stresses that the amount of jail time which could be imposed is to be considered the most important, almost exclusive, factor in making such a determination. The first of these cases is *Frank v. United States*, 395 U.S. 147, 89 S.Ct. 1503 (1969). *Frank* dealt with a criminal contempt charge arising out of the violation of an administrative ruling. The Court succinctly reviewed the steps a court should take in deciding whether or not a jury trial is warranted.

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective

> indications of the seriousness with which society regards the offense. . . .The most relevent indication of the seriousness of an offense is the severity of the penalty authorized for its commission.
>
> In the ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank*. at 89 S.Ct. at 1505.

Frank also held that collateral consequences of a conviction, if contemplated within the definition of "petty" by the legislature, would not remove an offense from the "petty" category. Thus the Court in *Frank* rejected the claim that a three year sentence of probation made an otherwise "petty" offense a "serious" one for purpose of a jury trial and noted that:

> "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself." *Frank*, 89 S.Ct. at 1506.

The next major federal case dealing with jury trials is *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886 (1970). In *Baldwin*, the defendant was charged with a crime which was punishable by up to one year imprisonment and which by statute could not be tried by jury. It was in *Baldwin* that the Supreme Court established the outer limit for the dividing line between "petty" and "serious" crimes. Any offense which carried a penalty in excess of six months in jail would be "serious", those whose maximum jail time did not exceed six months would be "petty". The Court made no mention of other factors, such as the amount of the fine, except to briefly refer to the $500.00 fine limit contained in the federal definition

of "petty" under 18 USC § 1. The majority of the opinion centers around the issue of imprisonment and the need for objective criteria to make a determination.

> " . . . This near-uniform judgment of the Nation [that any jail time over six months removes a crime from the 'petty' offense category] furnishes us with the only objective criterion by which a line could ever be drawn-on the basis of the possible penalty alone-between offenses that are and that are not regarded as 'serious' for purposes of trial by jury.
>
> Of necessity, the task of drawing a line 'requires attaching different consequences to events which, when they lie near the line, actually differ very little.' *Duncan*, supra, at 161, 20 L.Ed.2d at 502. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced the appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercusions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous as they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications." *Baldwin*, 90 S.Ct. at 1890.

Baldwin clearly sets forth the type of "balancing" test the Supreme Court recommends in all cases involving the jury trial issue. However, lower courts and numerous attorneys have taken *Baldwin* out of context. For example, the national standards language of Baldwin has been referred to by Judge Reed in *Bronson* and by the Ninth Circuit in some opinions as supporting grounds for the granting of jury trials in DUI cases. *United States v.*

Craner, 652 F.2d 461 (9th Cir. 1976). The reasoning stated is that since the majority of states do grant a defendant a jury trial for DUI offenses, then this is a reflection by the "nation" that the offense is a serious one. While many states do allow for jury trials in DUI cases, they also allow jury trials in most misdemeanor cases, that is most cases where the penalty does not exceed six months' in jail. Those states which still punish DUI by penalties which do not exceed the six month standard still consider the offense as "petty." These states have not redefined "petty", instead they have simply determined that jury trials should be granted in all crimes, petty or not, either because their state constitutions require jury trials in all criminal matters and are broader in scope than the federal constitution, or because state legislatures have enacted statutes providing for jury trials in petty offense cases. Nationally, the standard for defining a "petty" offense still turns primarily around the maximum possible jail sentence and the six month rule. *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687 (1974); *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2687 (1974).

For some years after *Duncan*, the Supreme Court did not rule on the relationship of fines to "petty" offense. This changed with the rendering of the decision of the Court in *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975). The Court in *Muniz* noted that while the six month guideline had been taken in part from the statutory definition of a "petty offense" contained in 18 USC § 1(3) ($500.00 fine and/or six months imprisonment) this did not mean that any fine which exceeded $500.00 would automatically cast the offense into the serious category. *Muniz* involved a $10,000.00 fine which was

imposed against a labor union in a contempt type proceeding. The High Court did not set any outside fine standard for jury purposes in *Muniz*, but it did indicate that fines are, to some extent, at the bottom of the considerations which are to be weighed.

> "It is one thing to hold that deprivation of an individual's liberty beyond a six month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, *regardless of the circumstances* a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different." (Emphasis added). *Muniz* at 477.

Blanton cites *Rife v. Godbehere*, 814 F.2d 563 (C.A. 1987) where the Ninth Circuit held that the defendant was entitled to a jury trial on the basis alone that he was subject to a $1,000 fine pursuant to a charge brought under an Arizona statute. The reasoning to support this decision is weak in view of the *Muniz* decision. It is also unrealistic in the sense of the economics of our times; a $500 fine had much greater impact twenty years ago on an individual defendant than a $1,000 fine would today.

Based upon a reading of the Supreme Court cases cited above, the City submits that no federal grounds exist for this Court to grant jury trials for DUI defendants. The fact that Nevada's statute requires mandatory, as opposed to discretionary, imposition of imprisonment is irrelevant, since the Supreme Court stated in *Duncan, supra*, that it is the potential, not the actual jail sentence which is important. The fact that the DUI statute contains provisions such as mandatory counseling and that a DUI

conviction will result in collateral consequences (such as the loss of a driver's license or enhanced punishment on a second offense) is insufficient to mandate a jury trial. *Frank, supra*, contained an obvious statement of the High Court that regulatory provisions of sentencing, such as probation, do not take an offense out of the "petty" category if it is otherwise treated as a "petty" offense, that is, punishable by no more than six months in jail. As noted in *Baldwin, supra*, the fact that the conviction could result in serious consequences and repercussions does not control whether the crime is classified as "petty" or "serious." Finally, the mere fact that Nevada has chosen to impose a $1,000 fine, instead of a $500 fine, does not automatically remove the offense from the "petty" category, especially given the rulings of the Nevada Supreme Court in this area, specifically in *State v. Smith*, supra.

Considering the above analysis, it is difficult to agree with the reasoning of Judge Reed in *Bronson*. With all due respect to Judge Reed, the City submits that his opinion in *Bronson* presents an incomplete statement of the case law in this area and the rationale and policies set forth by the United States Supreme Court.

Judge Reed relied heavily upon two Ninth Circuit cases dealing with jury trial issues. *United States v. Craner*, 652 F.2d 461 (9th Cir. 1976) and *United States v. Sanchez-Meza*, 547 F.2d 461 (1976). The City's reading of both of these cases is that they represent attempts by the Ninth Circuit to expand the concept and scope of jury trials way beyond that established by the United States Supreme Court. The City does not agree with the reasoning of the Ninth Circuit in either case and argues that while the Ninth Circuit (absent an overriding ruling from the

Supreme Court) can create a greater scope of jury trials in the federal courts under its appellate jurisdiction, its rulings are not binding upon the State of Nevada and are in direct contradiction with the case law established by the Supreme Court, which is binding upon Nevada. Moreover, both *Craner* and *Sanchez-Meza* concerned federal offenses taking place on federal land. Thus, interpretation of federal statutory law was involved, not state law.

Not every federal court agrees with *Craner*. In *United States v. Fletcher*, 505 F.Supp. 1053 (1981), the United States District Court for the Western District of Virginia not only summarily denied a request for a jury trial involving a DUI committed in a federal park, but also rejected the *Craner* concept of looking beyond the authorized penalties. Indeed, the *Fletcher* Court specifically held that:

> . . . the revocation of the right to operate a vehicle upon the highways, . . . is not a part of the punishment provided by law to be fixed by a court or jury upon conviction of a crime. The revocation . . . follows as a consequence and effect of conviction for crime. *Fletcher* at 1054.

Another federal court has rejected the concept that courts should consider the treatment of the offense at common law or whether the offense is *malum in se*, again in direct conflict with *Craner* and *Sanchez-Meza*. The United States District Court for the District of Puerto Rico, in *Matos v. Rodriquez*, 440 F.Supp. 673 (1976), firmly rejected the "nature of the offense" method of classifying crimes for purposes of jury trials. The Court gave great

weight to the Supreme Court decision in *Frank, supra,* and stated that:

> . . . the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. It concluded that of the objective indicators, the most important is the severity of the sentence. In cases where the maximum penalty has been provided for in a statutory manner, the legislature has been said *to include within the penalty imposed a statement about the seriousness of the offense.* . . .
>
> . . . It is thus clear that the doctrine of *District of Columbia v. Colts,* supra, wherein the primary importance was given to the nature of the offense, is no longer applicable. *Matos* at 676, 677.

Even the Ninth Circuit has had occasion to backtrack with regard to its decision in *Craner.* In *United States v. Arbo,* 691 F.2d 862 (1982), the Ninth Circuit referred to its policy in *Craner.* In *Arbo,* the defendant was charged with a violation of both federal statute and a federal regulation. The Court noted that its decision in *Craner* was based on "extraordinary circumstances", that is the lack of legislative judgment because the offense arose from a federal regulation. But in *Arbo,* the Court said no extraordinary circumstances existed since the defendant was charged under a federal statute, which did show legislative judgment that the crime should be a petty offense and triable without a jury.

In addition to the *Arbo* decision, the Ninth Circuit has, in one other opinion, apparently recanted, at least in part, the doctrine in *Craner.* In *United States v. Jenkins,* 734 F.2d 1322 (1983), the Court found that the imposition of a two year probation period under the Youth Corrections

Act did not create extraordinary circumstances warranting a jury trial; that this collateral consequence did not remove the offense from the petty category because it was punishable by not more than six months in jail. (Jenkins involved a simple assault.)

Given the detailed review of the case law contained in this Brief of the decisions of the United States Supreme Court, together with an in depth reading of the decisions of the Ninth Circuit, which are often ambiguous at best, it is evident that DUI offenders in the State of Nevada, and, more specifically, those charged in the Municipal Court of North Las Vegas, do not have a constitutional right to a trial by jury.

For the reasons heretofore stated, the City requests that the Court uphold the decision and order below and remand the case to the Eighth Judicial District Court for a trial do novo without a jury. The nature of a misdemeanor DUI offense in Nevada has not changed from what is categorized as "petty" to that of "serious". The maximum authorized punishment remains at six months in jail, which constitutes a clear line of demarcation between petty and serious offenses.

DATED this 30th day of July, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I served a copy of the foregoing Respondents' Answering Brief by placing a true and correct copy of the same for mailing sealed in an envelope properly addressed for mailing in the United States Mail at North Las Vegas, Nevada, postage prepaid, addressed to:

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DATED this 30th day of July, 1987.

/s/ Sherry Berrett
An Employee of the City of
North Las Vegas

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

APPELLANT'S REPLY BRIEF

(Filed Sept. 2, 1987)

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CASES

Casper v. Cheatam No. 86-307, 07/21/87 Wyoming Supreme Court 41 CrL 2354 (08/12/87) (Attached as Appendix).....1

Landry v. Hoepfner 818 F.2d 1169 (CA5 1987).....1

Landry v. Hoepfner 822 F.2d 510 (CA5 1987).....1

I.

LEGAL MEMORANDUM

Counsel, in this Reply Brief, wishes only to point out two (2) recent cases which have allowed jury trials in DUI cases. The first is *Casper v. Cheatam*, No. 86-307, 07/21/87, a Wyoming Supreme Court case which has yet to be reported. The case is reported at 41 CrL 2354 (08/12/87) and a copy of that page is attached for the review of the Court in the Appendix. The majority appears to have based the finding on the Wyoming Constitution, but requires a jury trial or demand even when no jail term is possible upon conviction, and only a maximum fine of $750.00 can be imposed.

The second case is *Landry v. Hoepfner*, 818 F.2d 1169 (CA5 1987) wherein a three-judge panel held that the Sixth Amendment required a jury trial in a DUI case in Louisiana. There, upon conviction, the Court reasoned, a six (6) month jail term is possible, a fine of up to $500.00, serious economic repercussions can occur (increased insurance rates), public opprobrium, and a sixty (60)-day suspension of the driver's license. The reasoning of this case is impeccable. *Landry* was ordered set for *en banc* hearing, 822 F.2d 510 (CA5 1987).

II.

CONCLUSION

State and Federal cases overwhelmingly allow jury trials in DUI cases. The State of Nevada is one of a small minority of states which have shown reluctance to

recognize the right. This Court should require a jury trial upon demand in a first-offense DUI case.

DATED this 28th day of August, 1987.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
601 South Sixth Street
Las Vegas, Nevada 89101
(702) 385-7277
Attorney for Defendant/
Appellant MELVIN BLANTON

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS, NEVADA Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ADDELIAR D. GUY, DISTRICT JUDGE, Respondents. and MARK D. FRALEY, Real Party in Interest.	No. 18065

WRIT OF CERTIORARI

(Filed Dec. 31, 1987)

TO: The Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of certiorari issue,

NOW, THEREFORE, you are compelled to vacate your order reversing Mark D. Fraley's conviction and to enter a new order consistent with the decision of this court; in your case entitled Mark D. Fraley v. City of North Las Vegas, Case Number C76512.

WITNESS The Honorables E. M. Gunderson, Chief Justice, Thomas L. Steffen, Cliff Young, Charles E. Springer and John C. Mowbray, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 31st day of December, 1987.

(SEAL)

Judith Fountain
Clerk

/s/ Jeanne C. Richard
Chief Deputy Clerk of the
Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 20, 1988

Mr. John Julian Graves Jr.
601 South Sixth Street
Las Vegas, NV 89101

Re: Melvin R. Blanton and Mark D. Fraley, v. City of North Las Vegas, Nevada No. 87-1437

Dear Mr. Graves:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 20, 1988

Mr. John G. Watkins
333 N. Rancho Drive, #633
Las Vegas, NV 89106

Re: Melvin R. Blanton and Mark D. Fraley, v. City of North Las Vegas, Nevada No. 87-1437

Dear Mr. Watkins:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.